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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1934

No. 361

E. W. CLARK,

COMMISSIONER OF INSURANCE OF THE STATE OF IOWA, AS RECEIVER OF FEDERAL SURETY COMPANY, PETITIONER,

vs.

HARRY O. WILLIARD, W. W. WHEATON, AND C. W. HAY,

AS TRUSTEES OF GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, AND GORDON CAMPBELL-KEVIN SYNDICATE, A COMMON-LAW TRUST, RESPONDENTS.

PETITIONER'S REPLY

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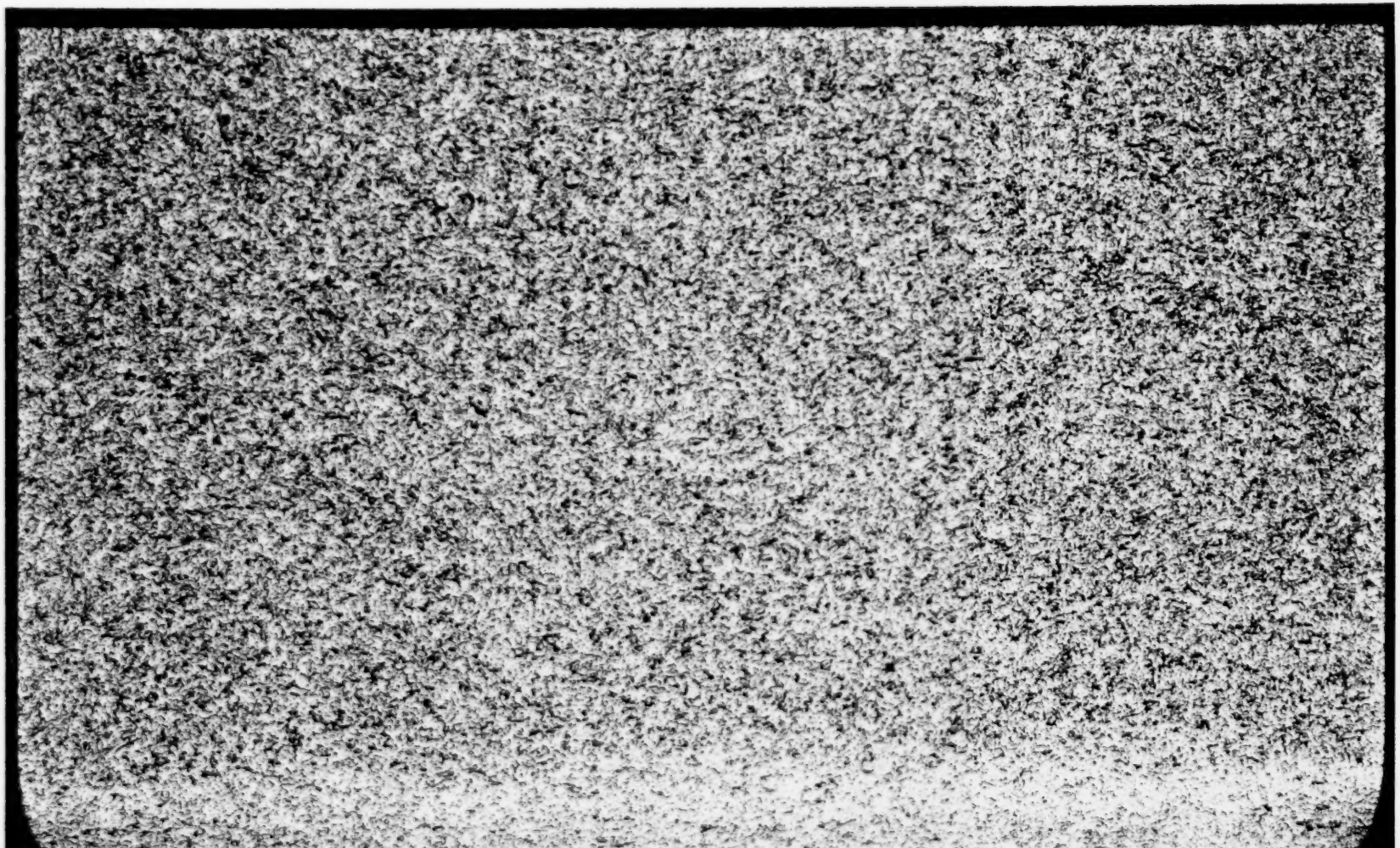

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PETITIONER'S REPLY

FOREWORD.

Petitioner has stood upon his petition and brief in support thereof and has not filed a supplemental brief. This brief is in reply to respondents' two briefs, viz., the one filed in resistance to the petition, and the separate supplemental brief served on petitioner's counsel December 27, 1934.

The burden is on respondents to uphold the execution levy through which they seek other than ratable distribution.

They seek to satisfy that burden by the contention that this is a controversy over property in Montana, control of which they say is free from constitutional mandate.

This reply demonstrates that respondents seek to retry the question whether the Iowa statutory charter provisions are entitled to full faith and credit and demonstrates that the real issue is whether the State of Montana, by obstructing the ratable distribution called for by the Iowa statutory charter provisions, has violated the Constitution of the United States.

> The question on this Appeal is whether the policy announced by Montana violates the Federal Constitution. The question whether the Iowa statutory charter provisions are entitled to full faith and credit is not open.

Respondents say Montana need not give full faith and credit to the statutory charter provisions in question.

They do not present their discussion in such plain terms; but the effect of their Points is invariably reduced to the contention that the Iowa statutes are not entitled to full faith and credit.

That question is no longer open. On the former appeal this Court decided (Clark v. Williard, 292 U. S. 112, 78 L. Ed. 1160) that the Iowa statutory charter provisions are entitled to full faith and credit. That holding is the law of the case and is not open to retrial at the behest of respondents.

The only question is whether the Montana court has extended or has withheld the full faith and credit to which this Court has said the Iowa statutes are entitled.

> The Iowa statutory charter provisions fix the relation of each creditor to all the others and call for ratable distribution. The Montana courts have obstructed the operation of those provisions.

The Iowa legislature unquestionably had sole power to determine the relative rights of the creditors, one against the

other, of an insolvent Iowa insurance corporation. That elemental truth follows from the very nature of the corporate entity as defined by repeated holdings of this Court, including Converse v. Hamilton, 224 U. S. 243, 56 L. Ed. 749; Bank of Augusta v. Earle, 13 Pet. 519, 10 L. Ed. 274; Canada Southern R. R. Co. v. Gebhard, 109 U. S. 527, 537.

That relation was within the jurisdiction of the Iowa legislature. The Iowa legislature acted. This Court has said that its acts and the relative rights created thereby must be given full faith and credit.

The controversy is really between the respondents as one creditor and all the other creditors of the corporation, and the issue is whether, as against all the other creditors, Montana may permit respondents to take other than their ratable share in the due course of liquidation.

Respondents lay great stress on matters of title. The designation of the charter liquidator and the title to property are only the machinery through which the relative rights of the creditors are adjusted.

In Montana Petitioner is a charter liquidator with the powers of a receiver. The courts of Montana failed to accord him that status.

For the purpose of assuring ratable distribution, the Iowa statutes, as construed by the Iowa courts and this Court, have terminated the corporate existence and have vested title in the statutory successor, who is a trustee for the benefit of all creditors and who is endowed by those statutes with the powers of a receiver.

The Montana court by its judgment in this very case has held that in Montana executions cannot be levied after the appointment there of a receiver.

In Montana petitioner is a liquidator with the powers and prerogatives of a receiver. Montana cannot question that status, for that is derived from the law of the corporate being.

Montana, notwithstanding the foregoing, has failed to accord to petitioner the protection that it affords to a receiver appointed by the Montana courts.

Attempt is made to bolster the decision now under review by citing Gilna v. Baker, 78 Mont. 357. The directors there acting as trustees were sued, not with respect to corporate liabilities, but in connection with their own accounts as trustees.

Neither the Montana court nor respondents have answered the challenge that the Montana statutes (Section 9303, Revised Codes of Montana, 1921) provide for the appointment of a receiver for a dissolved corporation and that the Montana court has adjudged in this very case (R. 21) that a receiver appointed in Montana will be protected against execution levy.

Such a holding withholds faith and credit to the Iowa statutes or, as pointed out in the petition for certiorari herein, violates the equal protection clause in that it discriminates between a receiver appointed in Montana and one appointed in Iowa. Even a foreign corporation is entitled to the protection of the equal protection clause. Hanover Fire Insurance Co. v. Carr, 272 U. S. 494, 71 L. Ed. 372.

This Court is free to determine whether the policy of Montana as now declared violates the Constitution.

It is said by respondents that the Montana court had the right to declare the policy of Montana as to statutory successors; that this Court remanded the case in order that Montana might so do; and that this Court is now bound by the declaration of policy set forth in the decision now under review. Respondents say that otherwise this Court did a vain thing when it remanded the case.

Such a result does not follow. On the former review this Court decided that the Montana court had misjudged the quality of petitioner's title. Unable to find a satisfactory expression of policy by the Montana court or legislature as to

statutory successors, this Court necessarily remanded the case for such an expression.

Certainly this Court by so doing did not leave the Montana court free to declare and put into effect unconstitutional policies. The interpretation by a state court of a state law is binding upon this Court, but it is not true that this Court in accepting the meaning thus given may not exercise its independent judgment in determining whether that meaning violates the Federal Constitution. Hanover Fire Insurance Co. v. Carr, 272 U. S. 494, 71 L. Ed. 372; St. Louis Southwestern R. Co. v. Arkansas, 235 U. S. 350, 59 L. Ed. 265.

The policy of Montana is not material and may not overcome a defense based on Iowa law. Denial of full faith and credit because of policy is nevertheless denial.

Respondents place great reliance on declarations of policy by the Montana court.

The relation between an Iowa corporation and its creditors is not concerned with Montana policy.

This view is supported by the analogy to the relation between a corporation and a stockholder. In Converse v. Hamilton, 224 U. S. 243, 56 L. Ed. 749, this Court held that no state other than the state of corporate domicile may be said to have a policy with respect to the relation of corporation and stockholder.

In Hancock Bank v. Farnam, 176 U. S. 640, 44 L. Ed. 619, this Court held that, notwithstanding Rhode Island policy to the contrary, the courts of that state must enforce against the stockholder of a Kansas corporation a judgment which according to the laws of the latter was enforceable.

In Bradford Electric Light Co. v. Clapper, 286 U. S. 145, this Court held that New Hampshire must adhere to the Vermont Workmen's Compensation Act notwithstanding it was repugnant to New Hampshire policy.

Particularly is policy immaterial to overcome a *defense* based on an applicable foreign law which is entitled to full faith and credit. Petitioner here relies on the Iowa statutes as a defense against the purported execution levy.

The Iowa statutes have been held entitled to full faith and credit. They are urged by way of defense. Denial of full faith and credit is no less a denial because of state policy.

The trial court entered a decree which confirmed the title of petitioner and denied the validity of respondents' purported execution levy (R. 58). Respondents moved to set that order aside and, in the alternative, to substitute certain proposed provisions therein (R. 63). Petitioner defended against that motion by objections which appear at R. 87 and 88. In asserting this defense petitioner is acting on behalf of all creditors of the Surety Company. Petitioner seeks by that defense to resist an attempt to obtain other than ratable distribution by proceedings after dissolution and contrary to the Iowa statutes and decrees.

It follows that petitioner is not attempting in Montana to enforce a foreign cause of action but is presenting a defense based on the Iowa statutes which are entitled to faith and credit.

There is a vital distinction in that a court which merely refuses to affirmatively furnish a remedy based on foreign statutes or decrees leaves the party's substantive right unimpaired. On the other hand, a court which declines to recognize a defense against an asserted right brings about an adjudication of the merits.

The situation would be less acute if the refusal of Montana to give faith and credit were to leave the substantive situation unchanged. The Montana decision does not leave the substantive situation unchanged; it results in a final adjudication.

Reversal of the Montana decision will not subject Montana to the legislative caprice of other states. Montana voluntarily admitted Federal Surety Company. No other state can impose its corporations upon Montana.

Respondents urge that to reverse the Montana court in this case will subject Montana and the control of property there situated to the imposed legislative caprice of the other states. No such result would follow. Iowa cannot impose its corporations on other states. Montana could have refused, and in the future can refuse, to admit any corporation the charter of which provides for ratable distribution in the event of insolvency. Having admitted a corporation the charter of which does provide for ratable distribution, Montana cannot be heard to say that by that admission it has changed the charter provisions.

The operation in Montana of the ratable distribution charter provision results from the voluntary act of the State of Montana evidenced by the admission of the Iowa corporation.

The sovereignty of Iowa and not of Montana is endangered in this litigation. If Montana is permitted to frustrate ratable distribution between creditors of an Iowa corporation, there will have been taken from Iowa the sovereign right to control corporations of its creation, a right which only the creator of a corporation can exercise.

Reference is made to the analogy presented by the marital status which is discussed at Pages 10 and 11 of the petition for certiorari in this case, wherein it is demonstrated that Montana cannot inquire into the validity of a divorce or marriage of Iowa residents. Corporations are within the jurisdiction of the state of creation as effectively as, if not more effectively than, the marital status of persons there residing.

State control of property is subject to constitutional mandate.

Respondents assert that Montana's power to control property within its borders is not affected by the full faith and credit clause.

They cite no authority directly in point. They cite only cases where the courts have held that the Constitution did not delegate any power to the Federal government with respect to property control and therefore that the states are free from any interference from Federal control.

Those cases have no application here. Petitioner does not contend that the control of property has been delegated to the Federal government.

Petitioner relies on the fact that by the Constitution Montana agreed that at the behest of any interested party it would give full faith and credit to the acts and decrees of other states.

There are also those cases which hold that tangible property within a state is not affected by adoption, divorce, or probate laws and proceedings in other states. In those cases the state of situs had in no way assented to the foreign law (as by admission of a corporation), and the state which passed the law had no jurisdiction comparable to the jurisdiction of a state which created a corporation.

The governing principle is not unlike the operation of the due process clause, which did not delegate any power to the Federal government but nevertheless restricted the right of each state to deal with property.

The short answer is that this Court has already held the Iowa charter provisions are entitled to full faith and credit.

Respondents have failed to establish a levy on tangible property with a situs in Montana.

Assuming the accuracy of respondents' contention as to property, respondents cannot in this record show that they have levied on property with a situs in Montana.

The only reference in the record to the nature of the property involved is in the affidavit, R. 68 to 87, and particularly at R. 70, which was submitted in support of respondents' motion to vacate the order and decree entered by the trial court. That affidavit at R. 70, after reciting respondents' judgment and the issuance of the writ of execution, continues:

> " * * thereupon the said Sheriff of Lewis and Clark County, Montana, duly levied upon certain property and bonds of said Federal Surety Company in the hands of A. H. Stafford, Commissioner of Agriculture of the State of Montana, amounting to about $19,000.00 and affiant exhibits hereto, as Exhibit No. 3, a full true and correct copy of said Writ of Execution and, thereafter, on or about the 26th day of May, 1932, the said Sheriff of Lewis and Clark County made a further levy upon the sum of about $8,500.00 of funds in the hands of the Clerk of the District Court, in and for Lewis and Clark County, Montana, belonging to the said Federal Surety Company, its officers or agents, in trust therefor * * "

There is no proof that the property so levied upon was tangible property, and there is no contention that any right by way of pledge had been conferred upon the respondents as to that particular property. For an interest in that property they are dependent entirely upon the levy of execution.

For all that appears in the record, the bonds which they sought to reach were intangibles and may have been bonds of the United States Government or of persons not residing in Montana. The bonds at most were evidences of a debt.

The funds in the hands of the Clerk of the Court which they sought to reach are alleged to have been in trust, but the nature of the trust is not specified, and, for all that appears, that so-called fund was merely a receivable, entirely analogous to a bank deposit or deposit of money with any other person or corporation in Montana.

The distinction between tangibles and intangibles is clearly illustrated by the inheritance tax cases, Baldwin v. Missouri, 281 U. S. 586, 74 L. Ed. 1056; Beidler v. South Carolina Tax Commission, 282 U. S. 1, 75 L. Ed. 131; Farmers Loan & Trust Co v. Minnesota, 280 U. S. 211, 74 L. Ed. 374. In

those cases this Court has determined that evidence of a debt, such as a bond or receivable, has its situs at the residence of the owner, that the transfer thereof is in no way dependent upon the law of any other state, and that an inheritance tax can only be levied by the state of decedent's domicile, and that no inheritance tax can be levied by the state in which the evidence of the debt happened to be located or where the debtor happens to reside.

It follows that respondents cannot demonstrate from the record that the property in question had a situs in Montana. Even though tangible property situated in Montana were free from constitutional mandate, respondents have failed to establish in this record that Montana law as to property governs the items on which they have sought to levy in this case.

The validity and effect of the Iowa liquidation statutes have been upheld by this Court and are not open to question on this appeal.

Respondents contend that the Iowa statutory charter provision relied upon does not apply to them because it was not enacted until 1929 and their cause of action accrued in 1925.

Respondents made this same contention on a former submission of this case in this Court. See Point XIV at Page 35 of respondents' supplemental brief filed in Case No. 449 at the October Term 1933. The decision handed down by this Court in Clark v. Williard, 292 U. S. 112, 78 L. Ed. 1160, ruled on this point adversely to the respondents. The law of the case rule effectively answers this contention, which they seek to repeat.

Nor can it be correctly said that there is any error in the law of the case as settled by this Court.

The Iowa Code of 1897 and subsequent Codes have contained the Section which directed dissolution and appointment of a receiver. It is that Section, by virtue of terminating the corporate existence, which vested title in the statutory successor. Section 8964, Code of Iowa, 1931, being also Section

1731 of the Code of Iowa, 1897 (see Appendix to petition herein).

In 1929 the Iowa legislature merely added the provision that the receiver called for by Section 8964 should henceforth be the Insurance Commissioner. That additional provision merely restricted the discretion of the Iowa courts in determining who shall act as receiver; it did not change the status of the corporation.

The additional provision was enacted in 1929, prior to respondents' purported levy of execution in 1932.

Respondents seek to uphold an execution levy. The validity and effect of that levy must be judged as of the date of the levy. Its validity if it had been levied years earlier is not the question.

The correctness of the law of the case as settled by this Court is further supported by the fact that the right to amend and repeal statutory charter provisions was clearly reserved by the Iowa legislature and by the Iowa Constitution. See Appendix hereto for Section 8376, Code of Iowa, 1931, which also appeared as Section 1619 of the Code of Iowa, 1897. Also see Appendix hereto for Article VIII of the Iowa Constitution.

Charter amendments made pursuant to reserved authority are binding on all parties. Modern Woodmen v. Mixer, 267 U. S. 544, 69 L. Ed. 783; Royal Arcanum v. Green, 237 U. S. 531, 59 L. Ed. 1089. The State of Montana was without power to change the corporate charter as it existed at the time of admission or as thereafter amended.

The Iowa law does not permit execution levies after commencement of liquidation proceedings.

Respondents urge that the Iowa law permits execution levies. They point to Section 8402 of the Code of Iowa 1931 and to the Iowa decision of Watts v. Southern Surety Co., 248 N. W. 347.

The Watts case dealt with an execution levied before the appointment of an ancillary receiver of a foreign corporation and is no criterion from which to judge the law of Iowa which prevails as to levies after appointment of a statutory successor for a dissolved Iowa corporation.

Nor does Section 8402 of the Code of Iowa, 1931, permit execution levies. That Section reads as follows:

> "8402. DISSOLUTION—RECEIVERSHIP. Courts of equity shall have full power, on good cause shown, to dissolve or close up the business of any corporation, and to appoint a receiver therefor, who shall be a resident of the state of Iowa. An action therefor may be instituted by the attorney general in the name of the state, reserving, however, to the stockholders and creditors all rights now possessed by them."

That Section merely confers upon the Attorney General of Iowa power to proceed against corporations under circumstances where he might not have had that power at common law. Mindful that the Attorney General might not proceed in all cases, the Section preserves to stockholders and creditors the right to proceed if the Attorney General does not proceed. In other words, the proceeding by the Attorney General was not established as the exclusive method.

That Section merely preserved the rights "now possessed", which are the rights at the effective date of the act. At that date respondents had not levied execution nor, in fact, had their cause of action arisen. Section 8402 certainly did not preserve a lien that was not in existence at the date it was enacted.

> The operation of statutory charter provisions requiring ratable distribution is not dependent upon consent.

Respondents urge that their cause of action is derived from an attachment bond upon which Federal Surety Company appeared as surety and that they never consented to that attachment bond and never contracted with the Surety Com-

pany. The answer to that proposition is found in the fact that the State of Montana admitted the corporation to do business in Montana and authorized it to there execute attachment bonds.

The State of Montana had the power to prescribe whether or not security should be given by the plaintiff in an attachment suit and to prescribe what security, if any, should be given. Montana might have decided that corporations whose charter provisions were similar to those of Federal Surety Company should not be accepted as sureties on attachment bonds. When the Montana legislature enacted provisions which permitted Federal Surety Company to do business in that State and to become surety on such bonds, it did so with full knowledge of its charter provisions. Montana could have permitted the attachment without security. Respondents' rights are limited to those afforded by the law of Montana. By permitting Federal Surety Company to become surety on attachment bonds the State of Montana did not change its corporate charter. The State of Montana was without power to change the charter.

The fact that respondents did not consent to the attachment against their property and to the bond which was given as security cannot operate to make that bond a different obligation of the Surety Company than it would have been had they consented to the bond. This necessarily follows because no power other than the State of Iowa, which created the corporation, could bring about a result contrary to the corporate charter.

As demonstrated in this brief, the corporate charter called for ratable distribution, and to enjoy other than ratable distribution the respondents must show a lien acquired prior to the dissolution of the Surety Company, a showing they cannot make; for otherwise they have utilized the Montana law to bring about a violation of the statutory charter provisions, in direct violation of the full faith and credit clause.

Not only is consent by the respondents unnecessary, but the burden is on the respondents to establish that their execution does not violate the corporate charter.

CONCLUSION.

In this record are all the essentials for a final decision. This Court has decided that petitioner derived his powers from statutory charter provisions which are entitled to full faith and credit. The Montana court has declared its policy to be antagonistic to statutes such as the Iowa statutes and to an officer such as petitioner. There remains the question whether the Federal Constitution prevents Montana from reaching the result presented by this record.

It is respectfully submitted that a reversal must necessarily follow an application of the fundamentals of corporate government as laid down by the former decisions of this Court.

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APPENDIX.

Statutes.

Section 8376, Code of Iowa, 1931, being also Section 1619 of the Code of Iowa, 1897.

8376. Legislative control. The articles of incorporation, by-laws, rules and regulations of corporations hereafter organized under the provisions of either title 19, 20, 21, or 22 or whose organization may be adopted or amended thereunder, shall at all times be subject to legislative control, and may be at any time altered, abridged or set aside by law, and every franchise obtained, used, or enjoyed by such corporation may be regulated, withheld, or be subject to conditions imposed upon the enjoyment thereof, whenever the general assembly shall deem necessary for the public good.

Article VIII, Constitution of the State of Iowa.

CORPORATIONS.

How created. SECTION 1. No corporation shall be created by special laws; but the General Assembly shall provide, by general laws, for the organization of all corporations hereafter to be created, except as hereinafter provided.

Taxation of corporations. SEC. 2. The property of all corporations for pecuniary profit, shall be subject to taxation, the same as that of individuals.

State not to be a stockholder. SEC. 3. The State shall not become a stockholder in any corporation, nor shall it assume or pay the debt or liability of any corporation, unless incurred in time of war for the benefit of the State.

Municipal corporations. SEC. 4. No political or municipal corporation shall become a stockholder in any banking corporation, directly or indirectly.

Banking associations. SEC. 5. No act of the General Assembly, authorizing or creating corporations or associations with banking powers, nor amendments thereto shall take effect, or in any manner be in force, until the same shall have been submitted, separately, to the people, at a general or special election, as provided by law, to be held not less than three months after the passage of the act, and shall have been approved by a majority of all the electors voting for and against it at such election.

State bank. SEC. 6. Subject to the provisions of the foregoing section, the General Assembly may also provide for the establishment of a State Bank with branches.

Specie basis. SEC. 7. If a State Bank be established, it shall be founded on an actual specie basis, and the branches shall be mutually responsible for each others liabilities upon all notes, bills, and other issues intended for circulation as money.

General banking law. SEC. 8. If a general Banking law shall be enacted, it shall provide for the registry and countersigning, by an officer of the State, of all bills, or paper credit designed to circulate as money, and require security to the full amount thereof, to be deposited with the State Treasurer, in United States stocks, or in interest paying stocks of States in good credit and standing, to be rated at ten per cent. below their average value in the City of New York, for the thirty days next preceding their deposit; and in case of a depreciation of any portion of said stocks, to the amount of ten per cent. on the dollar, the bank or banks owning such stock shall be required to make up said deficiency by depositing additional stocks: and said law shall also provide for the recording of the names of all stockholders in such corporations, the amount of stock held by each, the time of any transfer, and to whom.

Stockholders' responsibility. SEC. 9. Every stockholder in a banking corporation or institution shall be individually responsible and liable to its creditors, over and above the amount of stock by him or her held, to an amount equal to his or her respective shares so held for all of its liabilities, accruing while he or she remains such stockholder.

Bill-holders preferred. SEC. 10. In case of the insolvency of any banking institution, the bill-holders shall have a preference over its other creditors.

Specie payments—suspension. SEC. 11. The suspension of specie payments by banking institutions shall never be permitted or sanctioned.

Amendment or repeal of laws—exclusive privileges. SEC. 12. Subject to the provisions of this article, the General Assembly shall have power to amend or repeal all laws for the organization or creation of corporations, or granting of special or exclusive privileges or immunities, by a vote of two thirds of each branch of the General Assembly; and no exclusive privileges, except as in this article provided, shall ever be granted.